BOOK REVIEWS

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. The Dartmouth Alumni Lectures, 1921. Boston: Marshall Jones Company. 1921. Pp. xv, 224.

The title of this brilliant little volume might, more accurately, have been, "The Spirits of the Common Law," for it depicts the common law as the battleground of many conflicting spirits, from which a few relatively permanent ideas and ideals have emerged triumphant. As a whole, the book is a pluralistic-idealistic interpretation of legal history. Idealistic, because Dean Pound finds that the fundamentals of the common law have been shaped by ideas and ideals rather than by economic determinism or class struggle; he definitely rejects a purely economic interpretation of legal history, although he demands a sociological one (pp. 10-11). Pluralistic, because, unlike those nineteenth-century philosophers who tried to make legal history stand for the unfolding of a single idea—rational will (Hegel), popular spirit (Savigny, Puchta)—Dean Pound finds a number of ideas which have contributed to the spirit of the common law.

The title is reminiscent of two other volumes, one in the eighteenth and one in the nineteenth century, which are of the same philosophical pedigree: Montesquieu's *"L'Esprit des Lois"* and Jhering's *"Geist des römischen Rechts."* Montesquieu's book, which antedates Comte, has been called by Ehrlich "the first attempt to fashion a sociology of law"; his doctrine of the relativity of law to geographical, ethnical and economic conditions was at war with the dominant law-of-nature theory of his time. Jhering, though usually classed as a "social-utilitarian" (Paulsen, a follower, calls it "eudaemonism"), has contributed several important ideas to the program of the sociological school—among them the conception that "interests" are the ultimate realities back of "legal rights," the teleological or functional viewpoint in solving legal problems, and the negation of the sufficiency of purely juristic concepts, logically applied, to satisfy the jural needs of modern society. These contributions Dean Pound, as a leader of the sociological school, gracefully acknowledges in the present volume (pp. 203-5).

We must hasten to add, however, that the present volume does not pretend to cover the ground that the other two "Spirits" do. Dean Pound's immediate task in the present volume is that of presenting to a well-educated but non-professional audience an understandable picture of our legal institutions. This object he has faithfully adhered to. Whether the well-educated layman will be able to understand the volume in print is another question. Those who have heard Dean Pound lecture on these same topics will notice many slurrings of detail, many omissions of concrete illustration, which make his lectures vivid and comprehensible. Those who are familiar with the author's articles on "Sociological Jurisprudence" will miss the apparatus of foot-notes in which he is wont to overwhelm the reader with the

wealth and variety of his citations. There is not a single foot-note in the present volume. Obviously, a book for laymen!

Yet the lawyer will find many stimulative ideas crowded into these two hundred pages—ideas which will help him to solve the first problem at the office tomorrow morning, for Dean Pound has the rare virtue, for a legal philosopher, of always keeping his feet on the ground. Take, for instance, the feudal notion of "relation," which the author seems to have rescued from the limbo of nineteenth-century jurisprudence. Under the feudal system, the relation between lord and man was one of reciprocal rights and duties (p. 20) which were defined by the law, once it was found that the relation existed. This, the author says, became the typical common-law method of dealing with legal problems. In the nineteenth century it was crowded aside by the individualistic conception of contract (legal transaction), borrowed from the Roman law (modern), by which it was sought to derive all legal consequences of a given human relation from the manifestations of the wills of the parties voluntarily entering thereinto.

Thus, viewed as an attempt to coerce the wills of employer and employee into making a certain contract involving fundamental changes in their reciprocal rights and duties, as previously interpreted, a Workmen's Compensation Act is an arbitrary and officious interference with individual liberty. But viewed as an exercise of the time-honored prerogative of lawmakers to alter and prescribe the legal incidents of the relation of master and servant in such a way as to secure weighty social as well as individual interests, such a statute is in harmony with the spirit of the common law (pp. 29, 30). More recent still are statutes regulating the incidents of the relation of landlord and tenant, which was the basic relation of the feudal system (p. 22). By judicial decisions, chiefly, the relation of carrier and passenger has been regulated with a minuteness of detail which no theory of free-willing contractors can adequately explain. The relation of parent and child, for centuries almost untouched by law, has recently been regulated by juvenile court legislation. Thus, to a surprising degree, "relation" explains recent legal developments as in harmony with the spirit of the common law.

The conception of a legal transaction (contract, in the broadest sense) "regards individuals only. In the pioneer agricultural societies of nineteenth-century America such a conception sufficed. In the industrial and urban society of today classes and groups and relations must be taken account of no less than individuals" (p. 31). "Relation" is a more concrete, more human concept than our bloodless conception of contract, which, as Ehrlich has pointed out, does not describe the interest to be protected, but merely designates the conditions under which the claim to legal protection arises. In this respect, moreover, the "relation" of the common law is to be distinguished from the abstract metaphysical "jural relations" which Professor Kocourek (starting from Savigny) has written about lately, and from the analytical "legal relations" which Professor Corbin advocates. The former (the "relation" of the common law) is a species of concrete

human association, contrasted with such legal categories as contract and pure tort; the latter are generic categories embracing all phases of human conduct having legal consequences, including contract and tort. The legal consequences of the one are derived from a consideration of the interests involved in the particular relation, by a process largely intuitive; the legal consequences of the other are derived by *a priori* reasoning from the abstract nature of the concept. The latter is a logical conception; the former may be called, for lack of a better word, a sociological conception.

Dean Pound is not unaware of some of the disadvantages of the common-law relation. In the first place, it leads to a certain narrowness in the field of tort-liability; the judges tend to exclude liability with undue strictness where no "relation" is involved (p. 24). The passenger in the Pullman, for example, is entitled to the highest degree of care, but the tramp on the "blind baggage" is scarcely regarded as a human being. Again, the amplification of the incidents of a particular relation is apt to develop a sort of "law-of-nature," in which fanciful duties and over-refined standards of conduct are imposed. The fiduciary relations of equity (p. 25) have sometimes been over-refined. The law of mortgagor and mortgagee and of carrier and passenger might be drawn upon for further examples. Thirdly, while, as Dean Pound points out (p. 30), relation is to be distinguished from "status," or the capacity for legal rights and duties (infancy, coverture, slavery), yet is it not conceivable that the sum-total of the disabilities incident to a series of relations may be but little short of those imposed by an inferior status?

Of the eight essays, the one on "Puritanism and the Law" is the least convincing. Religious interpretations of legal history are apt not to be satisfactory, as the author realizes. At first we are told that the Puritan insisted upon a maximum of individual liberty, and, as a corollary thereto, desired a minimum of legislation (p. 46). Yet the Puritan, both in England and New England, was a prolific legislator (p. 47). Dean Pound endeavors to reconcile these two statements by saying that the Puritans believed in *instruction* through legislation (p. 47), in a multitude of rules with no adequate provision for carrying them into effect (p. 56). It seems too much to say that the "blue laws" were merely meant to be advisory. Weakness of law enforcement is a common American trait, not less conspicuous in the non-Puritan South than in Puritan New England. At all events, the author's indictment of Puritanism makes interesting reading.

In "The Pioneers and the Law" Dean Pound departs from his dazzling manipulation of ideas to give us a sociological interpretation of the formative period of American legal history. Here are depicted with bold, sure strokes the social factors of the period 1800-1860 which made for intense individualism in our legal and political philosophy and for certain archaic features in state judicial organization (pp. 121-2), for our "sporting theory" of judicial procedure (p. 125) and for many features of our slow and creaky machinery of criminal justice (p. 123).

The final chapter, deceptively entitled "Legal Reason," deals with the

stage of legal development upon which we are now entering: the "socialization of the law," in which legal philosophy is once more to come into its own (p. 149). The author takes pains to assure the timid reader that "socialization" does not mean "socialism" (p. 195). Here we are given a taste—but only a taste—of the methods and concrete results of sociological jurisprudence. Without attempting to define "interest" (Bentham gave it up nearly a century and a half ago), yet paraphrasing it carefully as "claim," "demand," "want," Dean Pound says, cautiously, that "at least" six groups of social interests may be enumerated as "involved in the existence of civilized society" (p. 208). Thus, the author's scheme of social interests is not a closed system; he does not purport to have discovered (as many legal philosophers before him have done) all the philosophical premises or criteria of a legal system.

The six groups of social interests are: 1, "the general security, the claim or want of civilized society to be secure from those acts or courses of conduct that threaten its existence," which includes "peace and order," "the general health," "the security of acquisitions" and "the security of transactions"; 2, "the security of social institutions," "domestic, religious and political"; 3, "the conservation of social resources," which seems to include natural resources, whether privately owned or not; 4, "the general morals, the claim or want of civilized society to be secure against those acts and courses of conduct which run counter to the moral sentiment of the general body of those who live therein for the time being." It is not clear that this group may not be distributed under the other groups; but it is perhaps worth while, pragmatically, to catalogue separately the demand that law shall not be out of harmony with popular sentiments generally. The author has elsewhere indicated that not all moral principles are to be turned into legal rules (pp. 43-44); 5, "general progress," "economic, political and cultural." This group must remain somewhat nebulous until the social scientists or the philosophers give us a definition of "progress." Dean Pound probably means to include such things as freedom of speech and of scientific research; 6, "the social interest in the individual human life, the claim or want of civilized society that each individual therein be able to live a human life according to the standards of the society." This interest is different from the individual's interest in his own life. It would seem to postulate the general prevalence of an altruistic social philosophy.

Individual interests are not included in this enumeration; apparently they are to be secured only in so far as they may happen to coincide with or run parallel to a social interest (p. 203). This subordination of individual interests is fundamentally opposed to the conclusion reached by all the dominant nineteenth-century schools of legal philosophy, since each of these, whatever its premises, finally arrived at the view that the object of law was to secure a maximum of individual self-assertion (p. 151).

Dean Pound gives a number of examples in which he contrasts the nineteenth-century way of looking at specific legal problems with the method of sociological jurisprudence (pp. 196-203). The method advocated is the

balancing of interests. "The criterion actually employed is the one proposed by William James as a principle of ethical philosophy—'since all demands conjointly cannot be satisfied in this poor world,' our aim should be 'to satisfy as many as we can with the least sacrifice of other demands'" (p. 199). This method seems essentially the same as that advocated by two leading Continental writers of the sociological school, Ehrlich and Kantorowicz. Dean Pound adopts the pragmatic ethics. But pragmatism is eclectic, a method rather than a system of philosophy. How are we to know which interests to protect and which to sacrifice? Surely it is not to be determined by a mathematical formula; we cannot count interests as we count votes, and adopt that solution of a problem which has a numerical majority of interests in its favor. The author here appears to rely upon Kohler's "jural postulates of civilization" (p. 82), for he emphasizes frequently "the existence of civilized society" as the fundamental thing to be protected (pp. 208, 201). Perhaps it is a virtue rather than a defect of sociological jurisprudence that it has no definite philosophical premises, no *Weltanschauung*. In many of the examples given by Dean Pound the solution, once we catalogue the interests involved, will appear fairly certain, whatever one's social philosophy may be. For the more doubtful cases, the sociological jurist is in a position to accept the conclusions of sociologists, if they have any.

So far as the present volume goes, the method put forth is that of balancing interests by intuition or on the basis of casual observation. Obviously, in balancing interests we are not to consider merely the individual case, but to treat it in terms of universal principles. The social interest in Jean Val Jean's existence must be secured in some other way than by sacrificing the universal social interest in the security of acquisitions as represented in the ownership of the loaf of bread. Yet even so, the method, if it is to be used as an instrument of constructive advancement rather than as an explanation of what has already happened, seems too subjective in its present shape to be an enduring criterion of legal rules and doctrines in a scientific age. The program of the sociological school includes a more exact plan of progress through coöperation between jurists and social scientists, whereby the former will adopt the scientific conclusions of the latter. How is this plan to be worked out? Where are we to get the trained investigators to carry out this program, and how are their results to be made available to the judge, the lawyer, and the legislator? Must the law lag behind until the sociologists' conclusions become axiomatic, or may we allow an elective judiciary, making, finding, interpreting, and applying the law by the method of judicial empiricism (Chapter VII), to balance social interests by the method of casual observation?

These and many other problems the author leaves unsolved. Ten years have passed since Dean Pound announced his treatise on sociological jurisprudence. The present volume—brilliant, erudite, stimulating, though it is—is not a fulfillment of that promise, which is yet to be redeemed.

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